



Montana Legislative Services Division  
Legal Services Office

EXHIBIT 3  
DATE 3/26/13  
HB 213  
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March 26, 2013

To: House Appropriations Committee  
From: Julie Johnson, Legislative Attorney  
Re: Legal Review of House Bill No. 213

INTRODUCTION

I have been asked to perform a legal review of House Bill No. 213. This bill proposes to give a tax credit of up to \$550 to those paying for tuition to a private school.

QUESTION PRESENTED

Whether a tax credit as proposed in House Bill No. 213 is or is not constitutional.

BRIEF ANSWER

The issue of whether a tax credit for tuition paid to a private school does or does not violate Montana's Constitution is not settled. However, it is not readily apparent that a tax credit as proposed in House Bill No. 213 is unconstitutional. Currently, Montana allows a tax credit for donations to private colleges in Montana that have a religious affiliation. Also, in a 2012 decision from the First Judicial District Court, Judge Sherlock noted that a tax credit is not an appropriation because, unlike an appropriation, a tax credit consists of money that has never been paid to the state treasury.

APPLICABLE LAW

Article X, section 6, of the Montana Constitution provides:

(1) The legislature, counties, cities, towns, school districts, and public corporations shall not make any direct or indirect appropriation or payment from any public fund or monies, or any grant of lands or other property for any sectarian purpose or to aid any church, school, academy, seminary, college, university, or other literary or scientific institution, controlled in whole or in part by any church, sect, or denomination.

(2) This section shall not apply to funds from federal sources provided to the state for the express purpose of distribution to non-public education. (Emphasis added).

Article VIII, section 14, of the Montana Constitution also provides:

1. The first part of the document is a list of names and addresses of the members of the committee. The names are listed in alphabetical order, and the addresses are listed below each name. The list is as follows:

Name	Address
Mr. A. B. C.	123 Main St., New York, N. Y.
Mr. D. E. F.	456 Elm St., New York, N. Y.
Mr. G. H. I.	789 Broadway, New York, N. Y.
Mr. J. K. L.	1010 Fifth Ave., New York, N. Y.
Mr. M. N. O.	1111 Third St., New York, N. Y.
Mr. P. Q. R.	1212 Second St., New York, N. Y.
Mr. S. T. U.	1313 First St., New York, N. Y.
Mr. V. W. X.	1414 West St., New York, N. Y.
Mr. Y. Z. A.	1515 East St., New York, N. Y.
Mr. B. C. D.	1616 North St., New York, N. Y.
Mr. E. F. G.	1717 South St., New York, N. Y.
Mr. H. I. J.	1818 Central St., New York, N. Y.
Mr. K. L. M.	1919 Union St., New York, N. Y.
Mr. N. O. P.	2020 Madison St., New York, N. Y.
Mr. Q. R. S.	2121 Park St., New York, N. Y.
Mr. T. U. V.	2222 Madison St., New York, N. Y.
Mr. W. X. Y.	2323 Park St., New York, N. Y.
Mr. Z. A. B.	2424 Madison St., New York, N. Y.
Mr. C. D. E.	2525 Park St., New York, N. Y.
Mr. F. G. H.	2626 Madison St., New York, N. Y.
Mr. I. J. K.	2727 Park St., New York, N. Y.
Mr. L. M. N.	2828 Madison St., New York, N. Y.
Mr. O. P. Q.	2929 Park St., New York, N. Y.
Mr. R. S. T.	3030 Madison St., New York, N. Y.
Mr. U. V. W.	3131 Park St., New York, N. Y.
Mr. X. Y. Z.	3232 Madison St., New York, N. Y.
Mr. A. B. C.	3333 Park St., New York, N. Y.
Mr. D. E. F.	3434 Madison St., New York, N. Y.
Mr. G. H. I.	3535 Park St., New York, N. Y.
Mr. J. K. L.	3636 Madison St., New York, N. Y.
Mr. M. N. O.	3737 Park St., New York, N. Y.
Mr. P. Q. R.	3838 Madison St., New York, N. Y.
Mr. S. T. U.	3939 Park St., New York, N. Y.
Mr. V. W. X.	4040 Madison St., New York, N. Y.
Mr. Y. Z. A.	4141 Park St., New York, N. Y.
Mr. B. C. D.	4242 Madison St., New York, N. Y.
Mr. E. F. G.	4343 Park St., New York, N. Y.
Mr. H. I. J.	4444 Madison St., New York, N. Y.
Mr. K. L. M.	4545 Park St., New York, N. Y.
Mr. N. O. P.	4646 Madison St., New York, N. Y.
Mr. Q. R. S.	4747 Park St., New York, N. Y.
Mr. T. U. V.	4848 Madison St., New York, N. Y.
Mr. W. X. Y.	4949 Park St., New York, N. Y.
Mr. Z. A. B.	5050 Madison St., New York, N. Y.

Except for interest on the public debt, no money shall be paid out of the treasury unless upon an appropriation made by law and a warrant drawn by the proper officer in pursuance thereof.

In the 2011 legislative session, the Legislature approved LR-123, a referendum to the voters regarding a contingent income tax credit based on an unaudited ending fund balance of a certain amount. A number of groups filed suit claiming that the referendum would improperly permit an appropriation by the voters and constituted an illegal delegation of power. While the courts ultimately decided that how the amount of the ending fund balance was calculated violated the separation of powers, the district court judge did address whether a tax credit is an appropriation, concluding:

For a number of reasons, this Court concludes that LR-123 does not constitute an appropriation of money. First, the money, whether it is in the form of a tax credit or tax refund, is not set aside for a "public purpose." Further, it is not set aside for "specified objects or demands against the state." Rather, the money is a tax refund or credit that a taxpayer may or may not claim. In the case of the credit, it is money that was never in the general fund, and in the case of a refund, it would be money that the state is not entitled to keep.

MEA-MFT v. McCulloch, BDV 2011-961, 2012 Mont. Dist. LEXIS 20.

Montana law currently provides for a nonrefundable tax credit of up to \$500 for contributions made to institutions of higher education, including a private college located in the state, such as Carroll College. § 15-30-2326, MCA. This tax credit was created in 1991, and there is no carryback or carryforward of the credit. It does not appear that § 15-30-2326, MCA, has been challenged.

This issue has been litigated before the United States Supreme Court,<sup>1</sup> which concluded that under Arizona's constitutional provisions, a tax credit for tuition paid to a K-12 private school is legal. However, Montana's Constitution more broadly restricts its Legislature than does Arizona's by prohibiting both "aid" as well as an "appropriation".<sup>2</sup>

#### ANALYSIS AND CONCLUSION

Montana's constitutional prohibition of aid to sectarian schools is drafted broadly and prohibits the Legislature from making "any direct or indirect appropriation or payment from any public fund or monies, or any grant of lands or other property for any sectarian purpose or to aid any

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<sup>1</sup>Arizona Christian School Tuition Org. v. Winn, \_\_ U.S. \_\_, 131 S. Ct. 1436 (2011).

<sup>2</sup>Ariz. Const. Art. IX, § 10: "No tax shall be laid or appropriation of public money made in aid of any church, or private or sectarian school, or any public service corporation."

church, school, academy, seminary, college, university, or other literary or scientific institution, controlled in whole or in part by any church, sect, or denomination." Although it can be argued that a tax credit is not an appropriation, there is a potential that a court could conclude that a tax credit constitutes aid. However, given that for the past two decades Montana law has provided for a tax credit for contributions made to a private state college that is affiliated with a religion, there is no clear concrete guidance that the tax credit proposed in House Bill No. 218 is or is not constitutional.